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IN THE

SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1978

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NO. 78-517

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RONALD CURTIS CHAMBERS,
Petitioner

V.

THE STATE OF TEXAS,
Respondent

* * *

On Petition For Writ Of Certiorari To The Court Of Criminal Appeals Of The State Of Texas

* * *

RESPONDENT'S BRIEF IN OPPOSITION

* * *

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

NOW COMES the State of Texas, Respondent herein, and by and through its Attorney General, Mark White, files this its Brief in Opposition.

OPINION BELOW

The opinion of the Texas Court of Appeals is reported as *Chambers v. State*, 568 S.W.2d 313 (Tex.Crim.App. 1978).

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Honorable Court under the provisions of 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

I. Whether Section 12.31(b) of the Texas Penal Code may be used to disqualify veniremen who cannot state under oath that the mandatory penalty of death or life imprisonment will not affect their deliberations on any issue of fact.

II. Whether the State of Texas may afford the prosecution a challenge for cause to prospective jurors who cannot consider the full range of punishment authorized by law.

III. Whether Petitioner was tried by qualified jurors, fairly selected.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U. S. CONST., Amendments V, VI, XIV.

2. Texas Penal Code, §12.31(b).

3. Texas Code of Criminal Procedure, Article 35.16(a)(3)

STATEMENT OF THE CASE

Petitioner was convicted of capital murder in Criminal District Court Number 4 of Dallas County, Texas. He was indicted by the grand jury of Dallas County, Texas, on April 21, 1975. The jury returned a verdict of guilty on July 18, 1975. On July 19, 1975, the

jury returned a unanimous verdict of "Yes" to the three special issues. Punishment was then assessed by the trial court at death. Petitioner's conviction was affirmed by the Texas Court of Criminal Appeals on May 24, 1978. Motion for Leave to File Motion for Rehearing was denied on June 28, 1978. However, the mandate of the Texas Court of Criminal Appeals was stayed by order of this Court pending the timely filing of a Petition for Writ of Certiorari on July 24, 1978.

The evidence, unchallenged for sufficiency, showed that two college students, Deia Sutton and Mike McMahan, were accosted as they left a Dallas nightclub by Petitioner and Clarence Williams. Petitioner and Williams, who had been sitting in an automobile adjacent to the victims' car, forced their way into the victims' car at gunpoint, along with two other men. Williams drove McMahan's car with McMahan in the passenger seat and Petitioner and Sutton in the rear seat. Petitioner was armed with a pistol and shotgun. While riding to the murder scene, Petitioner took Sutton's watch, coat and purse.

Williams parked the car at a levee at the Trinity River bottom. The two students were then pushed down the levee. As they approached the bottom, Petitioner ordered them to stop. McMahan asked "What do you want us to do?" at which time five shots were fired, one of which lodged at the base of Sutton's skull. Both victims fell to the ground at the bottom of the levee and soon Sutton heard the doors to the car open and close.

McMahan then yelled to Sutton, "Deia, are you alright?" But Sutton was frightened and lay still. McMahan yelled again, loudly, "Deia, can you move?" and she responded, "Don't talk, Mike, be quiet." Then she heard the car doors opening again and heard Williams say "They're not dead." Petitioner responded, "They've got to be dead; I shot them in the head." Williams again

told Petitioner that they were not dead and Sutton then heard the two of them run over to McMahan. Petitioner told him "Get up, boy" and Sutton heard McMahan being struck and scream. As Petitioner continued to beat McMahan, Williams ran to Sutton, jerked her to her knees and hit her in the face numerous times. While on her knees, she could see Petitioner beating McMahan with a shotgun. Sutton and McMahan were then dragged to the water and Williams told Sutton to put her head in the water and then Williams pushed her face under the water. Petitioner continued striking McMahan with the shotgun.

Finally, after McMahan quit screaming, Petitioner approached Sutton. She put her hands up and screamed, "Oh, God, don't kill me." But Petitioner swung and hit her with the shotgun. After he had struck her with the gun at least three more times, she heard Williams say, "Well, she's dead, let's go."

Ms. Sutton survived the attack and testified against Petitioner at trial. In addition to her eyewitness testimony, other evidence included accomplice testimony and implements of the crime.

McMahan died as a result of massive skull fractures and injuries to the brain caused by repeated blows to the head from a blunt object. Ten injuries to the head of the deceased were identified, including a massive four by one and a half inch hole in his skull. Additionally, part of the cranial bone was driven into the lung, and gunshot wounds to the arm and abdomen were found. A .22 caliber hollow-point bullet was recovered from his hip. This series of events formed the basis for which Petitioner received the death sentence.

ARGUMENT AND AUTHORITIES

I.

SECTION 12.31(b), OF THE TEXAS PENAL CODE, MAY BE USED TO DISQUALIFY VENIREMEN WHO CANNOT STATE UNDER OATH THAT A MANDATORY PENALTY OF DEATH OR LIFE IMPRISONMENT WILL NOT AFFECT THEIR DELIBERATIONS ON ANY ISSUE OF FACT.

The provision of Texas Penal Code, §12.31(b), is an independent standard for qualification, separate and apart from the standard enunciated in *Witherspoon v. Illinois*, 391 U.S. 510 (1968). Section 12.31 provides:

> "Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory upon conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states, under oath, that the mandatory sentence of death or imprisonment for life will not affect his deliberations on any issue of fact.

Respondent believes that the Texas Court of Criminal Appeals was correct in finding there was no reversible error during voir dire. *Witherspoon* certainly cannot be read to require the State to accept a venireman when that venireman is disqualified on the basis of a legitimate challenge other than total opposition to capital punishment. *Witherspoon's* broad principle envisioned a jury "given broad discretion to decide whether or not death is 'a proper penalty' in a given case . . . 'a jury guided by neither rules nor standard, free to select or reject as [it] sees fit'." 391 U.S. at 519 (footnotes omitted). That vision predated *Furman v. Georgia*, 408 U.S. 238 (1972), in which the decisive three members of this Honorable Court invalidated the capital punishment systems involved because of the lack of rules or standards guiding them in the imposition of the death sentence. The Texas response to *Furman*, was

examined in *Jurek v. Texas*, 428 U.S. 262 (1976) and found to be constitutionally valid.

In *Jurek* this Court observed that: ". . . [T]he Texas capital sentencing procedure guides and focuses the jury's *objective* consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death." 428 U.S. at 273 (emphasis added).

Veniremen who cannot take the oath required under Texas Penal Code, §12.31(b), may be excluded without entailing that a conviction-oriented jury results. Persons who indicate a willingness to perform their civic obligation as jurors and obey the law "cannot accurately be read prosecution-prone" because of their willingness to follow the law by determining the fact without regard for their feelings about capital punishment. *Spinkellink v. Wainwright*, 578 F.2d 582 (5th. Cir. 1978). In *Spinkellink*, the Court of Appeals for the Fifth Circuit recalled that "the State also enjoys a right to an impartial jury . . . and impartiality requires not only freedom from jury bias against the accused and for the prosecution, but freedom from jury bias for the accused and against the prosecution" 578 F.2d at 596 (citation omitted). Respondent contends, therefore, that Texas may properly determine that its "interest in the just, even-handed application of laws. . . including [its] death penalty statute, are too fundamental to risk a defendant-prone jury from the inclusion of such veniremen." *Id.*

There can be no objective consideration of the individual offense and individual offender if the juror cannot put aside his personal biases in answering questions of fact. For the State to allow a person to serve on a capital jury, knowing he could not promise to answer questions of fact without regard to his own beliefs or prejudices, either for or against the death penalty, would be to sanction trial by prejudice rather

than trial by evidence. The State should not be prevented from obtaining a jury composed of persons willing to set aside their prejudices in order to make the necessary factual determinations. *Cf. Locket v. Ohio*, ___ U.S. ___, 98 S.Ct. 2954 at 2960, (excluded veniremen "could not be entrusted to 'abide by existing laws' and to 'follow conscientiously the instructions' of the trial judge." *Id.* at 2960).

The Texas Court of Criminal Appeals has applied the jury selection standards to call for disqualification of veniremen who are prejudiced either for or against the death penalty. In a recent decision, *Cuevas v. State*, ___ S.W.2d ___ (Tex.Crim.App. No. 57, 116, delivered Dec. 20, 1978), the Texas Court reversed a death penalty conviction because the Petitioner had not been allowed to challenge for cause a venireman who was prejudiced in favor of the death penalty. The Texas statute, as interpreted and applied, seeks to ensure an impartial, fact-finding jury who will not be guided by prejudice or bias in making their deliberations, but rather will be objective fact-finders. The provisions of §12.31(b) do not exclude from jury service those who have mere conscientious scruples against the death penalty, but rather, exclude from service those veniremen who would make anything but an impartial fact-finding, based upon the evidence as to the individual offender and individual facts of the offense.

It should also be noted that the State had two unused peremptory challenges at the close of the voir dire. The presence of these unused peremptory challenges should render error, if any, harmless beyond a reasonable doubt. *Cf. Davis v. Georgia*, 429 U.S. 122 (1976), dissenting opinion.)

Petitioner specifically complains of the challenges as to Veniremen Hamilton, Chase, and McLarty. Mrs. McLarty, (SF 1834-1842) stated that she could not give

the death penalty, regardless of the facts and circumstances of the crime. She further stated that she could not put the fact that the death penalty might be the ultimate punishment out of her mind. There was no objection made to the excusal of this venireman on that basis. The only objection made was after she was excused, when counsel for Petitioner objected to the entire array of the panel on grounds independent of Mrs. McLarty's excusal. Lauretta Chase (SF 1085-1095) stated she was unequivocally opposed to the death penalty. She further stated that she could not take the oath required by Texas Penal Code, §12.31(b). The objection made to trial was not to the challenge for cause of Mrs. Chase, but rather was to the form of a question asked by the prosecutor. Marie Hamilton (SF 316-323) stated she unequivocally did not believe in the death penalty and further could not take the oath required by §12.31(b), Texas Penal Code.

Therefore, from the veniremen's testimony, it is clear that all three were properly excused from service on the panel.

II.

THE TEXAS LEGISLATURE PROPERLY AFFORDED A CHALLENGE FOR CAUSE TO PROSPECTIVE JURORS WHO CANNOT CONSIDER THE FULL RANGE OF PUNISHMENT.

The Texas Code of Criminal Procedure, Article 35.16(b)(3), provides the prosecution with a challenge for cause to a prospective juror with bias or prejudice against any phase of the law upon which the State may rely for conviction or punishment. The Texas Court of Criminal Appeals has interpreted this article to include challenges to veniremen who could not consider imposing the minimum punishment. *Moore v. State*, 542 S.W.2d 666, 669-70 (Tex.Crim.App. 1976). The

Petitioner in the case at bar had filed an application for probation, (SF 103). Therefore, for the attorneys for either side to discuss probation on voir dire was not improper.

It is the duty of the State to see that justice is done. Justice would not be served by qualifying jurors who could not consider the entire range of punishment that might be assessed.

It is difficult to see how Petitioner can be harmed by the State's exercise of a challenge to a venireman who would not consider a minimum punishment.

As construed by the Texas Court of Criminal Appeals, Article 35.16 provides that a venireman, biased or prejudiced against a minimum possible punishment, may be challenged by either the State under Art. 35.16(b)(3) or the defense under Art. 35.16(c)(2), since both "have the right to have the punishment assessed within the limits prescribed by law after a finding of guilty." *Huffman v. State*, 450 S.W.2d 858, 862 (Tex.Crim.App. 1970). In an appropriate case, the reluctance of a juror to impose the minimum punishment could work to the prosecution's disadvantage by hanging the jury on the question of punishment. Further, Petitioner has not shown how he was harmed by the exclusion of veniremen who could not consider the minimum punishment.

III.

PETITIONER WAS CONVICTED AND SENTENCED BY A JURY COMPRISED OF JURORS FAIRLY SELECTED WHICH MET ALL STATE AND FEDERAL CONSTITUTIONAL QUALIFICATIONS.

A careful review of the record indicates that all twelve of the jurors selected to sit in judgment of

Petitioner's case were committed to fair and impartial determination of his innocence and, if guilty, his punishment.

Although the Texas Court of Criminal Appeals found that Venireman Minicks was perhaps improperly excused, the Court found that the excusal was not reversible error. The Court held:

> "However, because there is no showing that Appellant did not receive a fair and impartial jury, and because the State exercised only 13 of its 15 peremptory challenges, one of which could have been used to remove prospective juror Minicks, no reversible error is shown. *Culley v. State*, 505 S.W.2d 567 (Tex.Crim.App. 1974); *Weaver v. State*, 476 S.W.2d 326 (Tex.Crim.App. 1972); and *Cf. Henriksen v. State*, 500 S.W.2d 491 (Tex.Crim.App. 1973)." *Chambers v. State*, 568 S.W.2d 313, 321 (Tex.Crim.App. 1978).

Respondent contends, as did the Court of Criminal Appeals, that the error, if any, was rendered harmless by the remaining peremptory challenges. *See, Davis v. Georgia*, 429 U.S. 122 (1976, dissenting opinion).

In addition, the trial judge's possible abuse of discretion must be viewed temporately in light of his ability to experience the voir dire questioning in person. With the advantage of observation of the intonations, attitudes, and facial expressions that are missing from a cold appellate record, the trial court may have been more understandably concerned with Venireman Minicks' feelings. Petitioner also complains that Venireman Nixon was improperly excused from the venire. Venireman Nixon stated that he did not believe in the death penalty under any circumstances. (SF 189). He also stated that he could not take the oath required by Texas Penal Code, §12.31(b).

Petitioner also complains about the inclusion of Juror Bolin on the jury. Mrs. Bolin (SF 1902-1941) consistently stated an attitude of fairness throughout the voir dire. She stated unequivocally that the fact that one of the witnesses' father was a customer of her husband would not influence her at all. She further stated that she did not know this customer or the family. (SF 1932-1937). As to any racial prejudice, Mrs. Bolin stated:

> ". . . but I don't think I'm bigoted, if that would answer your question. I--I think all of us are prejudiced to a certain extent about certain things, but as far as black--the black people are concerned, it's not one of the things that I feel that I am prejudiced about." (SF 1939).

It is apparent from the reading of the entire voir dire that Mrs. Bolin was fair and impartial.

CONCLUSION

Therefore, for all the foregoing reasons, Respondent respectfully prays that this Petition for Writ of Certiorari be in all things denied, or in the alternative, if Certiorari be granted, that the case be set for submission in order that both parties may have the opportunity to fully develop arguments presented herein.

Respectfully submitted,

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